

Message

From: Wall, Tom [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=128011AC603C4D1A82301ADA1BDFD733-TWALL]
Sent: 10/19/2018 10:52:27 PM
To: Hunter, Christopher [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=32905162cc58495da107db89c7dea903-Hunter, Chr]
CC: Havard, James [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9350676809e8403994f1dfc2b7bfdcfe-JHAVARD]; Lewicki, Chris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=7688d5b97aa94ba6af2f38984d479b56-CLewicki]
Subject: RE: Talking points for Oregon 2012 303(d) list

a little reordering, how's this look? NOTE THE QUESTION ABOUT TIMING AND ONE OTHER Q

- Faced with a Notice of Intent to Sue (NOI) for failure to take a mandatory action, Region 10 would like to finalize its action on the Oregon 2012 303(d) list, which the State submitted in November 2014.
- This action will involve EPA, with State support and RA concurrence, adding a large number of waters to the state's list.

Attorney Client / Deliberative Process / Ex. 5

- OGC is briefing up and will deliver its assessment of legal risk.
- BACKGROUND: More than any other State, Oregon has faced challenges in implementing its 303(d) listing program and, for years, has been unable to complete the listing process without significant EPA support.
 - OR has recently done a total program overhaul, acquired a new database, and hired new staff to form a listing team (they previously had less than 1 FTE for listing). EPA has provided HQ and contractor assistance to help OR select a new database and geographic platform to track their "waterbody assessment units" and helped them georeference their WQS. EPA is engaging with OR on listing methodology revisions and a stakeholder engagement process. OR is also undertaking its legislatively-required peer review process for methodology updates. EPA expects OR to submit a complete list catching up to the 2018 cycle to be submitted in 2019.
- In addition, in 2017 a district court overturned EPA's approval of temperature TMDLs for more than 700 Oregon waterbodies.
- Thus, In December 2016 [NOTE WHY DID WE ADD 714 WATERS FOR TEMPERATURE BEFORE THE 2017 DISTRICT COURT DECISION?], the Region responded to the State's submission by partially approving/partially disapproving and identifying 1054 waters to add to the state's list
 - 714 were due to the adverse decision in the temperature litigation.
- The Region also requested data and comments (while deferring action) on potential biological/aquatic life use impairments for one coastal segment.
 - The issue is whether **Attorney Client / Deliberative Process / Ex. 5**
Attorney Client / Deliberative Process / Ex. 5
- WHERE WE ARE NOW: At the request of the RA, the Regional water program has worked with the State to finalize and reach agreement on the added waters, and has reduced the number of waters added to 999 (285 + the 714 court-related segments). The State does not object to these waters being added to the 2012 303(d) list. OWOW agrees with the Region's recommendation to close out the process of adding these 999 waters.
- For the **Attorney Client / Deliberative Process / Ex. 5** the Region received comments both for and against listing
 - the State would prefer **Attorney Client / Deliberative Process / Ex. 5**
 - At a briefing prior to the filing of the NOI, **Attorney Client / Deliberative Process / Ex. 5**

- In August, after the most recent briefing with the RA, the Center for Biological Diversity (CBD) sent a NOI to sue based on EPA's failure to take final action on the 2012 303(d) list. CBD was one of the commenters urging EPA to list the coastal segment in response to EPA 2016 request for comments, and the NOI specifically references the coastal segment and some of the data indicating an impairment.
 - Note: CBD brought a lawsuit challenging EPA's decision to not list waters for ocean acidification in Oregon's and Washington's 2010 303(d) lists. The court deferred to EPA in February 2015 and upheld the Agency's decision not to list, due in part to the lack of site-specific field data.

Attorney Client / Deliberative Process / Ex. 5

Attorney Client / Deliberative Process / Ex. 5

- Ideally,

Attorney Client / Deliberative Process / Ex. 5

and to allow ODEQ to move forward with development of their 2014-2018 lists.
- We recommend that you consider OGC's assessment of legal risk and talk to the RA re: his action on the list.